

**SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
COMMITTEE ENQUIRY INTO THE PERSONAL PROPERTY SECURITIES
BILL 2008 [EXPOSURE DRAFT]
BY SIMON BEGG**

1. My Credentials

I am special counsel to Logie-Smith Lanyon, Solicitors, Melbourne. Between 1960 and 1995, I was a partner in Corrs Chambers Westgarth, Solicitors, and its predecessor firms. From 1995 until 2000, I was a consultant to Corrs Chambers Westgarth.

I have been actively concerned with personal property securities law reform from 1968 until the present time. In 1968, I was a member of the Law Council of Australia working party formed to respond to a questionnaire concerning the reform of consumer credit law prepared by a committee chaired by Professor Arthur Rogerson of Adelaide University. Because consumer credit law necessarily involves secured credit and because, at that time at least, security for consumer transactions was largely hire purchase and other title retention devices the response that the Law Council made to the Rogerson Committee necessarily also involved submissions on secured credit in that setting.

Subsequently, the initial Law Council Committee was requested by Sir George Reid, then Victorian Attorney General, to report upon the feasibility of implementing the reforms the Committee had suggested in its responses to the Rogerson Committee. The Law Council Committee, by that time known as the Molomby Committee, responded to the Victorian Attorney in January 1972. It submitted a supplementary report in 1973.

Mr R. E. McGarvie QC (as he then was) and I presented a paper to the Australian Legal Conference in 1971 designed to elicit comments on proposals that the Molomby Committee was considering. With fairly minor amendments this paper became the Molomby Committee Report. The Molomby Committee Report had a substantial section that proposed personal property security reform. In substance it proposed adoption of Article 9 of the Uniform Commercial Code of the United States. Concurrently, the Crowther Committee (U.K.) made similar recommendations in the United Kingdom.

Together with Professor Anthony Duggan, I was a consultant to the Victorian, Queensland and Australian Law Reform Commissions on their personal property security law reform references, a member of the Viney Committee (Victorian Committee, a committee appointed by the Premier to report on aspects of the Chattel Securities Act) (1985) and a member of the Victorian Ministry of Consumer Affairs working party on consumer credit law reform (1986-1987). Again along with Professor Duggan, I was a co-author of Duggan Begg and Lanyon, *Regulated Credit: The Credit and Security Aspects* (Law Book Company 1989).

The personal property security law reform references of the Victorian and Queensland Law Reform Commissions arose at my suggestion as a response to a draft PPSA Bill published by the Australian Law Reform Commission in, I think, 1990 at a Banking Law Association conference held in Auckland, New Zealand.

I recall that the ALRC draft Bill was prepared by Jude Wallace and Stephen Mason.

I spent an evening trying to persuade Stephen Mason that instead of “reinventing the wheel” as the ALRC proposed, he ought to adapt a North American PPSA (there was no New Zealand PPSA of the time). In this regard I was unsuccessful – hence the Victorian and Queensland Law Reform Commission References whose joint report was published in 1992. Justice Connelly of the Queensland Supreme Court and Professor Duggan spent long hours trying to

persuade Elizabeth Evatt, then the Australian Law Reform Commissioner, of a different course of action but they got nowhere. When they abandoned their efforts, I took them up and tried very hard to find some consensus way forward but without any success. I then tried to persuade the Australian Attorney General's Office to take up the project and visited Canberra for that purpose. Again I was not successful.

In 1994, Professor Duggan and I each presented papers to the Australian Banking Law Association Conference held in Adelaide in that year. In 1995, Professor Duggan and I attended a conference in Toronto Canada at which Professor Duggan presented a paper on PPSA. This conference was attended by world PPSA experts including Professor Ziegel Professor Duggan and Professor Ron Cummins. There was also an American Article 9 expert. Inevitably the Australian position came up – indeed that was why I was there in the first place. Professor Ziegel suggested that we enlist the assistance of Professor Allan of Bond University to hold a conference on the subject and try to persuade Australian Governments and Australian financial institutions of the desirability of the project.

This duly happened but, at the time, Australian banks could not be persuaded to support PPSA reform concurrently with a revision of credit legislation.

Professor Allan embraced this project. In time, some considerable time, Professor Allan's voice was heard by Minister Ruddock and the present project was born.

2. General Comments

The following comments are an updated version of the submission that I made earlier this year.

Professor Duggan, in 2008, is, in my opinion, the most qualified Australian to speak about personal property security reform. He, probably alone in the world, is expert on North American PPSA and also fully familiar with relevant Australian and New Zealand law on the subject. It is not for nothing that he holds a degree of Doctor of Law. The work that he and I shared together form part of the material considered in the conferring of that degree. His examiners included Professor Ziegel and Professor Sir Roy Goode QC who was the author of the English report (the Crowther Report) written concurrently in England with the Molomby report in Australia in 1971 and 1972.

I have been provided with a copy of Professor Duggan's submission dated 22 May 2008 and his revised submission dated 5 December 2008. I have read, also, the paper that he and Michael Gedye have presented this year in Germany on personal property security law reform in Australia and New Zealand: The Impetus for Change.

I endorse Professor Duggan's revised submission and suggest that the Australian Government should act on it.

The Personal Property Securities Bill 2008 has been revised, so the revised commentary claims, to take account of submissions made in response to the earlier version. What it proposes remains eerily similar to what Stephen Mason and Jude Wallace proposed on behalf of the Australian Law Reform Commission back in 1990. That is "reinvent the wheel". I do not believe that Australia's Attorney-General's staff and Australian parliamentary draftsmen are more expert than eminent academics and practical lawyers of the United States, Canada and New Zealand. These jurisdictions already have property security legislation in place. The revised commentary claims (paragraph 122)

"The Bill is modelled on the laws of New Zealand, Canada and the USA. It draws on work by the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for Unification of Private Law (UNIDROIT). The differences between

the Bill and its international counterparts reflect issues raised by stakeholders, differences in the Australian consumer and commercial environment, advances in information technology, and drafting styles adopted to improve legal certainty and consistency with Australian drafting practices.”

I do not think Australians should accept this assertion. I think that the differences in nomenclature and style reflect nothing better than a determination to be different for the sake of being different. If the United States, Canada and New Zealand had no PPSA laws there are a number of drafting matters and also policy issues upon which, if it were my decision, I would make different choices. But there are existing laws overseas. To adopt different nomenclature and different drafting styles is, in my opinion, inexcusable. Different policy choices should, in my view, be made only after very careful study and in full knowledge of all the consequences.

I participated in the preparation of the Law Council of Australia submission on the first exposure draft. I have seen the substantial comments of Committee members from Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jaques (four firms). There is clearly no shortage of disagreement with the first exposure draft. There is a multiplicity of views about policy perspectives. These factors, in my opinion, emphasise the importance, and correctness, of Professor Duggan’s views.

Nobody can pretend that personal property security laws are simple in concept or easy to read.

There are some policy changes from existing PPSA laws that are demonstrably correct which Australia has an opportunity to adopt but the North American jurisdictions did not, because of past history. Clearly the most important of these are to have a single national law instead separate state (or province) laws and to have a single register of security interests rather than separate state (or province) registers. In this respect, Australia gains the advantages of the unitary system in New Zealand despite, like the United States and Canada, being a federation.

The immense divergence of views, even if the Bill as a technical exercise were perfect, demonstrates to me the correctness of the view that I had in May 2006 when this project was first launched. That is that what Australia should do is adopt one of the existing PPSA Acts (Canadian or New Zealand) and make only those policy changes that are demonstrably correct – such as the unitary register. Then, after the Bill is enacted and has been in operation for say three years and Australian lawyers (both government and private) are expert, have a review and make changes from a position of knowledge rather than guesswork.

One change that I would have made (and which has not been made) is to draft the intellectual property tender for the necessary software on which the Bill will depend so as to allow for potential expansion of the project in the ways that logic now suggest that the project should be expanded. That way if, when Australian experience enables proper judgements to be made, it proves desirable to expand the project, it will not be necessary to spend many more millions of dollars in buying brand new software.

Having made a fundamental initial error to reinvent the wheel instead of building on existing models, the Australian Government has compounded that error, and guaranteed a poor outcome, by setting tight time deadlines that prevent proper considered submissions being made and proper debate about the myriad of issues that have to be addressed.

If these two errors were not enough the Australian Government has made a third one. This error may be attributed to the previous Minister but the present one has done nothing to correct it. The error is that instead of selecting the best experts in the country to serve on the “guiding” committee, the Minister appointed a guiding committee, very few of whom had relevant expertise. Then the Minister imposed strict secrecy upon them so that those members of the Committee who were appointed to represent, for example, the Law Council of Australia, (rather

than being selected by the Law Council to represent itself) were not able to communicate developments to the Law Council. As the Attorney-General's department explained to the Law Council, appointees to the guiding committee had to be "politically correct". What way is this to conduct law reform?

The first exposure draft was accompanied by a series of discussion papers raising questions. Commentators put in a very great deal of work endeavouring to answer all these questions. Without in any way belittling the work that was done, history will show that it would have been better had the commentators insisted on **not** answering the questions but instead **had advocated** copying an established PPSA changing only a very few things where it was **quite clear** that the change was an improvement. Debating a myriad of changes has merely encouraged the government to make them. The problem is that in a matter as complex as this, making one change affects many different aspects of the legislation. No even experts can see, immediately, what consequences follow.

The Australian Government has gone about this project in the wrong way and it is likely that its product will be judged harshly. It is interesting that the New Zealand project commenced on the footing that New Zealand, also, would reinvent the wheel. In that country however wiser heads prevailed and, of the most part, New Zealand followed a Canadian PPSA. Where New Zealand diverged, each of the diversions has proved controversial – see Professor Duggan's submission.

I think that the Law Council of Australia Committee did a fantastic job, considering the limitation of time and the myriad of views which were expressed. The answers they prepared to the first exposure draft will be a valuable resource when, ultimately, this Bill becomes law and is judged in the glare of reality.

3. My Suggestions

The Attorney-General's Office seeks to justify the adoption, in Australia, of different nomenclature from that used in New Zealand and Canada on the ground that Australia has made different policy decisions in regard to some of the issues and that, anyway, Australia should not adopt overseas drafting. Australia is certain to be the loser in this process. If everyone else in the world uses consistent terminology, Australia will be the odd one out. This has nothing to do with whether one would have chosen the same nomenclature if the PPSA project had been a greenfields project. It is simply a question of the rookie following tradition at least until the rookie (Australia) finds its feet.

Australia, certainly, will generate much mirth both in Australia and elsewhere from the Bill's hypothesis that the registration process is to register "the collateral" rather than a security interest in the collateral. The analogy I heard suggested that it is acceptable to say that a doctor treats a patient and the doctor treats the patient's disease is not, in my opinion, an apt one. A better analogy would be whether it would be appropriate to talk of registering a mortgage of land or to register the land in respect of a mortgage. It is this latter proposition that the Bill espouses.

It is a lot easier, correctly, to categorise an interest arising from a particular transaction as one which should be "a security interest" than to provide a definition of the expression "security interest". In my belief, section 28(2) of the Consultation Draft is precisely the wrong way to go about the task of explaining what a security interest is. What is fundamentally wrong with section 28(2) is that the examples may not, all, be correct and, more importantly, do not immediately strike the reader as describing documents or transactions that fit section 28(1). Moreover, although stated as examples, the length and diversity of the list inevitably opens an argument that documents and transactions that are not on the list are not security interests.

In my opinion if the government determines **not** to follow the North American or New Zealand models then section 28(1) must **at least** overtly catch

”an interest in personal property avowedly granted to secure a payment or performance of an obligation (such as repayment of a loan of money)”

as well as

“an interest in personal property that in substance secures a payment or performance of an obligation”.

There is no need, in section 28(2), to give examples of avowed creation of security interests. There is **no** purpose in including, in section 28(2) transactions, such as a PPS lease of a chattel, which do not, necessarily, achieve the same substance as an **avowed** creation of a security interest. The examples in section 28(2) should be restricted to hire purchase, conditional sale, Romalpa, recourse factoring and transactions truly similar. Section 28(3) properly addresses transactions that should be deemed to be security interests because the decision made to include them is purely arbitrary. For example, a PPS lease.

The revised Bill, section 191, states:

”a registration consists of the data required by the following table in relation to the collateral covered (or to be covered) by a security interest . . .”.

Item 2 of the table then states in respect of *“the grantor”* that the details of data required are as follows:

”each grantor’s details, unless the collateral is (a) consumer property and (b) required by the regulations to be described by a serial number”.

The revised explanatory memorandum says of this (paragraph B51):

“The Bill is amended to ensure that where property is serial numbered consumer property, the grantor’s details will not be recorded. This is consistent with the approach taken in the current REVS and VSR systems, and will improve individual privacy”.

Consumer property is defined by section 26. It means:

“personal property held by an individual, other than personal property held in the course or furtherance, to any degree of carrying on an enterprise to which an ABN has been allocated”.

In my opinion, the omission from the register of the grantor’s name for “privacy” reasons is “consumerism” gone mad. In order that a secured party obtains a valid security interest in serial numbered goods, the grantor must have an interest in (title to) the collateral. One can’t grant a security interest in goods if you have no interest in the goods. But if a grantor agrees to grant an interest in goods and, later, acquires title then the agreement becomes effective and the interest is granted. Under the REVS system, and under the Bill, it is quite possible for a thief, or person deriving title from a thief, to purport to grant a security interest in serial numbered goods and for that interest to be entered in the register. But the security interest so registered has no effect as against the true owner of the goods. This problem could have been avoided if the register, in respect of serial numbered goods, had also been a register of title. It could then have operated,

Torrens land style, as both the register of title to the class of goods and the register of security interests in those goods. Victims of car theft include not only the owner whose car was stolen but also a person who derives title from the thief such as a person who purchases from a vendor who is the thief (or someone who bought from the thief) and pays money thinking the vendor can pass title and borrows money to finance that purchase granting a (purported) security interest to secure that loan. The effect of the Bill is that if the serial numbered goods (in this case, the vehicle) is correctly serial numbered (the serial number has not been altered) a potential buyer can search to see whether a security interest is registered. If a security interest is registered, the proposed purchaser can avoid buying until a discharge is provided. But that is only part of the buyer's problem. The buyer still has to establish who the owner was. The fact that the grantor's name is not on the register simply makes the thief's task so much the easier. Under the REVS scheme the thief's task was made easier also because every State aspired to keep the national register of security interests in motor vehicles. There were competing registers. Despite sometimes well-meaning attempts to co-ordinate what was registered in these competing registers there were plenty of opportunities for thieves to profit from sale of stolen vehicles. The Bill misses an opportunity to cure this problem once and for all.

In a case where the collateral is not consumer property [that is to say where the collateral is not personal property or is personal property not held by an individual or is personal property held by an individual in the course or furtherance to any degree of carrying on an enterprise to which an ABN has been allocated] what section 181 requires is "each grantor's details". I presume that it is possible, under the regulations, that the grantor's ABN be specified rather than the grantor's name. I suggest that all that should be entered is the ABN rather than the name. Whilst both the grantor's name and the grantor's ABN could be misstated, it seems sensible to pick a single item with a view that simplicity is best. A search of the ABN will quickly give the name. Requiring both offers the opportunity to get two things wrong instead of one.

I have a further suggestion in regard to security interests granted by persons not in business, that is persons who do not have a ABN. This suggestion is that such security interests should only be registrable in the serial numbered part of the index. This would result in the saving of an immense of number of registrations against whitegoods, furniture and the like which would otherwise clutter the index and greatly increase administrative costs.

4. Professor Duggan, in paragraph 4 of his submission, points to errors in the Bill. He sets out selective examples.

I have found another one that I think is worth adding to his list. It is in section 50. After I received a copy of Professor Duggan's submission I raised it with him. He sent me a note which describes the error better than I can, so I append it.

My point in raising this particular error is that even to give the **appearance** of giving a title retention device preference over other forms of security interest is, as Professor Duggan says, "*fundamentally inconsistent with the substance over form philosophy of the PPSA*". This point is particularly important in that there was a substantial minority of lawyers who wished that PPSA excluded title retention devices from its operation. If effect was given to their wishes, there would be no purpose in having a PPSA at all.

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